

1 MICHAEL A. JACOBS (CA SBN 111664)
MJacobs@mofo.com
2 ARTURO J. GONZÁLEZ (CA SBN 121490)
AGonzalez@mofo.com
3 ERIC A. TATE (CA SBN 178719)
ETate@mofo.com
4 RUDY Y. KIM (CA SBN 199426)
RKim@mofo.com
5 MORRISON & FOERSTER LLP
425 Market Street
6 San Francisco, California 94105-2482
Telephone: 415.268.7000
7 Facsimile: 415.268.7522

8 KAREN L. DUNN (*Pro Hac Vice*)
kdunn@bsflp.com
9 HAMISH P.M. HUME (*Pro Hac Vice*)
hhume@bsflp.com
10 BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, N.W.
11 Washington DC 20005
Telephone: 202.237.2727
12 Facsimile: 202.237.6131

13 Attorneys for Defendants
UBER TECHNOLOGIES, INC.
14 and OTTOMOTTO LLC

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 WAYMO LLC,
19 Plaintiff,
20 v.
21 UBER TECHNOLOGIES, INC.,
22 OTTOMOTTO LLC; OTTO TRUCKING LLC,
23 Defendants.
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Case No. 3:17-cv-00939-WHA

**DECLARATION OF ERIC A. TATE
IN SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION TO
COMPEL**

Date: June 8, 2017
Time: 10:00 a.m.
Ctmm: F, 15th Floor
Judge: Hon. Jacqueline Scott Corley

Trial Date: October 2, 2017

1 I, Eric A. Tate, declare as follows:

2 1. I am a member of the bar of the State of California and a partner with Morrison &
3 Foerster LLP ("MoFo"), counsel of record for Defendants Uber Technologies, Inc. and Ottomotto
4 LLC in this action. I am admitted to practice before this Court. I am the co-chair of MoFo's
5 Global Employment and Labor Group and regularly litigate employee mobility cases. I submit
6 this declaration in support of Defendants' Opposition to Motion to Compel Production of the
7 Stroz Due Diligence Report. I have personal knowledge of the facts stated herein and, if called as
8 a witness, I could and would testify competently as to these facts.

9 2. I was contacted in late January 2016 by in-house counsel for Uber Technologies,
10 Inc. ("Uber"), to provide legal advice regarding a potential corporate transaction. That
11 transaction turned out to be Uber's acquisition of two target companies, Ottomotto LLC
12 ("Ottomotto") and Otto Trucking LLC ("Otto Trucking"), (collectively referred to as "Otto").¹

13 3. Uber had retained counsel, Cooley LLP, to advise it on the standard diligence,
14 negotiation and other corporate aspects of the potential transaction. Uber contacted me and my
15 law firm seeking legal advice as to potential litigation exposure arising out of the transaction.
16 Specifically, Uber sought legal advice regarding potential claims that could be brought by Google
17 against two of its founders, Anthony Levandowski and Lior Ron, who had left Google to create
18 the target companies that ultimately became Ottomotto and Otto Trucking. Uber retained MoFo
19 for this purpose in late January 2016.

20 4. Other parties to the potential transaction were represented by separate counsel.
21 The law firm O'Melveny & Myers LLP ("OMM") represented Otto. Two of Otto's founders,
22 Anthony Levandowski and Lior Ron, were separately represented by individual counsel. John
23 Gardner of Donahue Fitzgerald LLP ("Donahue") represented Mr. Levandowski, and Alisa Baker
24 of Levine & Baker LLP ("Levine") represented Mr. Ron.

25 5. On or about February 22, 2016, Otto and Uber signed a term sheet for the potential
26 acquisition. The term sheet set forth the agreed economic terms of Uber's potential acquisition of
27

28 ¹ While Uber acquired Ottomotto in August 2016, it has not acquired Otto Trucking.

1 Otto. In light of the possibility of litigation by Google, Uber agreed to indemnify certain
2 employees under certain circumstances regardless of whether the deal closed.

3 6. MoFo had been authorized, on behalf of Uber, to enter into a joint defense and
4 common interest agreement (“JDA”) with Otto and we did so as of at least February 24, 2016,
5 and later with Messrs. Levandowski and Ron.

6 7. Specifically, on February 24, 2016, I confirmed with counsel for Otto at OMM,
7 that Uber and Otto would proceed with investigating and obtaining facts necessary for MoFo and
8 OMM to advise our respective clients as to potential litigation arising out of the transaction under
9 a JDA that would later be memorialized.

10 8. On February 25, 2016, I received an email from OMM confirming the “discussed
11 plan on JDA.” A true and correct copy of this email is attached hereto as **Exhibit 1**.

12 9. Uber and Otto authorized MoFo and OMM to jointly engage a third-party
13 consultant to conduct an investigation regarding the activities of Mr. Levandowski, Mr. Ron, and
14 certain other former Google employees who had joined Otto, surrounding their respective
15 departures from Google and onboarding to Otto. The purpose of the investigation was to aid
16 MoFo and OMM in providing legal advice to their respective clients about litigation risks and
17 potential claims that could be brought by Google in connection with Uber’s acquisition of Otto.

18 10. On February 25, 2016, Adam Bentley of OMM and I contacted Stroz Friedberg
19 LLC (“Stroz”), a third-party risk management firm, to engage its professional services in
20 conducting an investigation to ascertain facts, that, in the opinion of MoFo and OMM, informed
21 the potential legal exposure and claims that could be brought by Google related to Uber’s
22 potential acquisition of Otto.

23 11. The Joint Defense, Common Interest, and Confidentiality Agreement was executed
24 on April 11, 2016 and states that it “memorialize[s]” the parties “understanding and oral
25 agreement.” Attached to this Declaration as **Exhibit 2** is a true and correct copy of the Joint
26 Defense, Common Interest, and Confidentiality Agreement.

27 12. Each of the parties needed the assistance of Stroz in order to provide legal advice
28 to their respective clients on their joint litigation risk, and jointly retained Stroz on March 4, 2016.

1 Attached to this Declaration as **Exhibit 3** is a true and correct copy of the Stroz Engagement
2 Letter, with information protected by the attorney-client privilege redacted. The Stroz
3 Engagement Letter memorialized that Uber, Otto, and Messrs. Levandowski and Ron (the “Joint
4 Defense Parties”) were parties to a Joint Defense and Common Interest Agreement, and that all
5 information received by Stroz and Stroz’s work product was to be treated as covered by joint
6 defense, common interest, attorney-client privilege and/or work product doctrine.

7 13. The Stroz Engagement Letter also memorialized the parties’ understanding of the
8 purpose of the investigation, which was to gather and synthesize information to provide to
9 counsel to assist in their assessment of possible legal claims that could be brought by Google.

10 14. On March 13, 2016, Alisa Baker confirmed her agreement that Mr. Ron and Levin
11 were parties to the JDA. Similarly, John Gardner confirmed his agreement that he and Mr.
12 Levandowski were parties to the JDA on March 22, 2016. From that point forward, I considered
13 my communications with counsel from OMM and for the individual parties to be confidential and
14 treated them as such.

15 15. The joint defense parties and their respective counsel agreed upon a protocol and
16 parameters for Stroz’s investigation. OMM, MoFo, Donahue, and Levine all discussed with Stroz
17 what topics to investigate and various issues related to how Stroz should investigate those topics
18 based upon each firm’s legal judgment and reasoning about potential litigation arising from
19 Uber’s acquisition of Otto.

20 16. As set forth in the engagement letter, Stroz agreed to provide all substantive
21 communications about the investigation to both MoFo and OMM, and further agreed to keep
22 confidential all information and data it received from MoFo, OMM, Uber, Otto, and Messrs.
23 Levandowski and Ron, and not to disclose any such information or data to any person other than
24 MoFo or OMM. To the best of my knowledge, Stroz complied with its obligations to provide all
25 substantive communications about its investigation to MoFo and OMM, and has kept confidential
26 all information and data it has received from MoFo, OMM, Uber, Otto, and Messrs. Levandowski
27 and Ron.

28 17. Uber and Otto signed the final merger agreement on April 11, 2016.

1 18. On August 5, 2016, Stroz provided its final report (the "Report") to OMM, MoFo,
2 Donahue, and Baker. Stroz transmitted the Report securely with password protection. Under the
3 Joint Defense and Common Interest Agreement, the parties were required to keep the Report in
4 the strictest of confidence. To my knowledge, the Report was not and has not been shared with
5 anyone other than the Joint Defense Parties, their clients and counsel, and Stroz.

6 19. I have checked with the MoFo attorneys and staff who I understand received a
7 copy of the Report, and I understand that MoFo has, at all times, treated the Report, exhibits
8 thereto, information learned from it, and all communications pertaining to it, as privileged and
9 confidential.

10 20. Additionally, I understand that MoFo has not shared any such information or
11 materials with any person other than in-house counsel at Uber, counsel at OMM, Donahue, and
12 Levine, and Messrs. Levandowski and Ron, as well as MoFo's co-counsel in the above-captioned
13 matter at Boies Schiller Flexner LLP, Otto Trucking's counsel in the above-captioned matter at
14 Goodwin Procter LLP, and counsel for intervenor Mr. Levandowski in the above captioned
15 matter at Ramsey & Erlich LLP.

16 21. The Report reflects areas of inquiry that OMM and MoFo identified as important
17 to their provision of legal advice regarding their clients' potential litigation exposure. The Report
18 also reflects the directives and protocols that OMM, MoFo, Donahue, and Levine provided to
19 Stroz to govern its investigation. Furthermore, the Report was prepared by Stroz for the purposes
20 of potential litigation and reflects mental impressions, conclusions, and opinions of the Stroz
21 investigators.

22 22. MoFo, OMM, Donahue, and Baker received the Appendix of Exhibits to the
23 Report on August 11, 2016, which was transmitted securely. MoFo received the actual Exhibits
24 referenced in the Appendix of Exhibits on August 13, 2016. MoFo did not send a copy of the
25 Appendix of Exhibits to Uber until after this litigation commenced, and has not provided to Uber
26 a copy of the actual Exhibits referenced in the Appendix of Exhibits.

27 23. As mentioned above, 159 exhibits are appended to the Report. The exhibits can be
28 grouped into four categories: (1) documents pertaining to the scope of Stroz's investigation and

1 protocols governing it; (2) interview memoranda prepared by Stroz investigators; (3) work
2 product prepared by Stroz investigators which analyzes information provided confidentially by
3 Messrs. Levandowski, Ron, and other Otto employees; and (4) documents collected by Stroz. An
4 additional category of documents are not relevant for purposes of Waymo's motion because they
5 were not responsive to the Court's March 16, 2017 Order (Dkt. 61) ¶ 4 and therefore were not
6 logged on Uber's privilege log, attached hereto as **Exhibit 4**.

7 24. Documents in category (1) reflect the directives and protocols that OMM, MoFo,
8 Donahue, Levine, and Stroz decided upon to govern Stroz's investigation.

9 25. Documents in categories (2) and (3) reflect communications and information that
10 Messrs. Levandowski and Ron, as well as certain employees of Otto, provided and made
11 available to Stroz in the course of its investigation, and such communications were sought from
12 these individuals confidentially and for the purpose of obtaining legal advice regarding potential
13 litigation exposure and claims that could be brought by Google arising out of Uber's acquisition
14 of Otto. These documents also reflect mental impressions, conclusions, and opinions of the Stroz
15 investigators.

16 26. Finally, Stroz's judgment in selecting the documents reflected in category (4)
17 supports the assertion of attorney-client privilege and work product protections.

18 27. We have learned during discovery in this case that Google was already
19 investigating Mr. Levandowski's computer at least as early as March 2016. We also have
20 learned that Google's investigation continued through the summer of 2016 and included
21 discussion of potential litigation against Uber on at least August 23, 2016. Attached is a true and
22 correct copy of excerpts from the deposition transcript of Gary Brown, attached hereto as
23 **Exhibit 5**.

24 28. Uber's merger with Ottomotto closed effective August 23, 2016.

25 29. It was not until October 28, 2016, three days after Otto publicly released video of
26 the world's first commercial delivery by a self-driving truck, that Google filed confidential
27 arbitrations against the founders of Otto.
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